IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.7824 OF 2005

1. Bharti Tele-Ventures Limited,
   a company incorporated under
   the Companies Act, 1956 and
   having its registered office
   at Qutub Ambience, B-5/12,
   Meheroli Road, New Delhi -
   110 030 and having its
   office at VEGA Centre,
   "A" Building, Swargate,
   Shankar Seth Road,
   Pune-37.

2. Mr. Sunil Bharti Mittal,
   of New Delhi, Indian Inhabi-
   tant, having his address at
   H-5/12, Qutab Ambience,
   Mehrauli Road, New Delhi
   - 110 030. .... Petitioners

- Versus -

1. State of Maharashtra,
   through the Secretary,
   Urban Development Depart-
   ment, Mantralaya,
   Mumbai-400 020.

2. Pune Municipal Corporation,
   having its head office at
   Shivaji Nagar, Pune-5. .... Respondents

Sarvasri Aspi Chinoy and F.E. Devitre,
Senior Advocates with Farhan Dubhash,
Nusarat Hasan, Ms Neha Pathak and
Prakash Dande, Advocates i/b M/s. D.H.
Law Associates for the Petitioners.

Shri Pradip Patil, Asst. Government Pleader,
for the Respondent No.1.

Sarvasri D.R. Zaiwalla, Senior Advocate with
V.G. Muzumdar, Advocate for the Respondent
No.2.

CORAM: R.M.S. KHANDEPARKAR &
V.M. KANADE, JJ.

DATED: MARCH 08, 2007

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard the learned Advocates at length. Perused the records.

2. By the present petition, the petitioners seek to challenge the Notification dated 4-7-2005 issued by the respondent No.1 under Section 154 of the Maharashtra Regional and Town Planning Act, 1966, hereinafter called as "the MRTP Act" by which the respondent No.1 has sought to amend its earlier order dated 9-10-1996 and thereby has authorised and/or required various Municipal Corporations in the State to charge retrospectively from 9-10-1996, the premium at the rate of the land value as per the ready reckoner for the area occupied by the cabin, the tower height premium at the rate of Rs.10,000/- per running metre and a deposit of Rs.50,000/- for granting permission under Section 45 of the MRTP Act to the petitioners and the other cellular operators for installing semi-permanent structures/cabins on the top of the building for housing Base Station/Telephone Connector to set-up a cellular mobile tele-communication system, in view of licence

granted under Section of the Indian Telegraph Act, 1885, hereinafter called as "the Telegraph Act" and the demand notices in that respect being Exhibits-E to E-10 annexed to the petition.

3. In and around 1995 the Government of India, pursuant to new telephone policy, decided to allow private operators to provide cellular tele-communication services and pursuant to the said policy, till 2001 issued licence to three cellular operators in the Maharashtra Telecom Circle, namely, BPL, Idea Cellular and VSNL. In the year 2001 the Government decided to allow fourth cellular operator in the Maharashtra Telecom Circle for the State of Maharashtra and Goa and the same was awarded in favour of the petitioner No.1, by issuing the licence under Section 4 of the Telegraph Act, followed by the necessary licence agreement dated 28-9-2001.

4. In furtherance of the said policy, the Urban Development Department of the Government of Maharashtra had issued directives dated 9-10-1996 under Section 154 of the MRTP Act to all the Municipal Corporations in the State, except the Brihanmumbai Municipal Corporation, that the Corporations shall initiate a proposal for modification under Section 37 of the MRTP Act to incorporate a provision in the Development Control

Regulations, hereinafter called as "DCRs" to the effect that "The area of one room for installation of telephone connectors as per the requirements of the Department of Telecommunication or the companies authorized on that behalf but not exceeding 20 sqm per building with the written permission of the Commissioner can be permitted free of FSI.". Simultaneously it was clarified that where similar provision had been already existing in the DC Regulations, the same can be made operative to the companies to whom valid license is issued by the Department of Telecommunication. It was also clarified that the decision as per the directives would come into force with immediate effect, pending the decision on the proposal for modification under Section 37 of the MRTP Act. In continuation of the said directives dated 9-10-1996 further directions dated 4-7-2005 under Section 154 r/w Section 37 of the MRTP Act were issued to remove the deficiencies in the directives dated 9-10-1996 and to have a uniform policy in respect of charging of deposit and the premium. The further directions were to the effect that such permission should be granted under Section 45 of the MRTP Act, and deposit of Rs.50,000/- should be charged, the premium shall be charged at the rate of the land value as per the ready reckoner for the area occupied by the cabin, while the tower height premium shall be Rs.10,000/- per running metre, to be effective from 9-10-1996.

Besides,under the Notification dated 24-5-1999 issued by the Government of India in exercise of powers under Section 19-B of the Telegraph Act, the holders of the licence under Section 4 of the Telegraph Act were conferred with the power to seek way-leave from the owners of the immovable property in the respective licence service area in connection with providing the telephone services by such licensees in such area during the currency of its licence as specified in the said Notification.

5. Pursuant to the licence agreement, the petitioner No.1 set-up the cellular mobile telephone services in various parts of the State and for that purpose entered into suitable arrangement with the various building owners in order to enable them to install Cell Sites on the roof of the buildings. Consequently, the petitioners filed various applications to the respondent No.2 seeking permission to place the necessary equipments on the roof top of the buildings and to construct temporary cabins on the roof top of various buildings situated in different parts of the City of Pune and in anticipation of the permission proceeded to erect the temporary cabins/shelters to house such equipments at various locations. The respondent No.2, however, refused to grant permission to install such Cell Sites unless the petitioner No.1 paid the premium,

as demanded by the Corporation and further threatened to take action for demolition of the Cell Sites in case of failure to pay the premium. Refusing to comply with the demand of the premium, the petitioners filed Writ Petition No.8518 of 2003 inter alia contending that the Telegraph Act does not require permission of the Corporation for erecting such sites and in any case the respondent No.2 has no power to levy any premium for grant of such permission. This Court disposed of the said Writ Petition by Judgment dated 13-12-2004, permitting the respondent No.2 to take appropriate steps to ascertain whether there is any violation of the DCRs by the petitioners and in case of any such violation, to issue show cause notice specifying the violation before taking any action or making any demand. breach. The contention of the petitioners about the absence of power to the Corporation to levy premium in light of the provisions of the Telegraph Act was specifically kept open. The respondent-Corporation after carrying out the inspection, issued notices, firstly under Section 260(1) of the Bombay Provincial Municipal Corporations Act, 1949, hereinafter called as the "BPMC Act", and then under Section 260(2) of the BPMC Act and demanded the premium and deposit in exercise of powers under Rule 6.6.2.2. of DCRs r/w Section 124A of the MRTP Act and the said Notification dated 4-7-2005.

6. The challenge to the impugned Notification and to the demand notices is threefold. Firstly, that the DCRs are framed and approved under Section 22(m) of the MRTP Act which does not confer any power to recover any tax/premium related to the area or height of the structure as a condition for granting the development/planning permission, nor Section 154 empowers the Government to authorise/require the planning authority to recover such premium as a condition for grant of permission under Section 45 of the MRTP Act. In any case, the premium sought to be claimed is not related to any expenses or cost incurred by the Corporation nor in relation to any service being rendered to the petitioners for performing their statutory duty under the MRTP Act and, therefore, without the authority of law. Secondly, it is the contention on behalf of the petitioners that the Telegraph Act is an exhaustive and a complete Code regarding the installation and operation of telegraph and telecom systems and the rights and obligations of the telegraph authorities and the licence regarding the installation of the equipments necessary for the operation of telegraph and telephone systems and Section 10(c) and (d) r/w Section 12 of the Telegraph Act expressly provide that the telegraph authority or a licensee to whom the power thereunder is delegated under Section 19-B of the Telegraph Act can exercise all the

rights of telegraph authority and there is no provision in the Telegraph Act which requires payment on that count to the local authority and, therefore, there cannot be any demand for premium or deposit for installation of cabin or erection of tower on the roof top of buildings. And the third ground of challenge is that the Telegraph Act falls within Entry No.31 of List I of the Seventh Schedule of the Constitution of India and the Parliament accordingly has exclusive jurisdiction to legislate with respect thereto and by virtue of Article 246(1) of the Constitution of India any provision of the MRTP Act or any order made thereunder would be invalid if they are repugnant or in conflict with the Telegraph Act or the rules and requirements made thereunder. The Section 7(2)(e) and (f) of the Telegraph Act confer exclusive jurisdiction on the Central Government to make the rules regarding the conditions and restrictions subject to which any telegraph line, appliance or apparatus for telegraphic communication shall be established and the charges in respect of the establishment of any telegraph line, appliance or apparatus. Hence the demand for premium for installation of the equipments for the operation of the licence for cellular mobile telephone services by the petitioners in the State of Maharashtra is repugnant to and in direct and irreconcilable conflict with the Telegraph Act and therefore void and without competence.

7. On the other hand, it is the case of the respondents that the subject-matter of the present petition being a semi-permanent structure in the form of cabin and tower on a building, the same does not fall within the purview of the definition of "telegraph lines" and "posts" as defined under the Telegraph Act and the provisions of the Telegraph Act are silent about the construction of cabins as well as the erection of towers on or above the buildings. Any construction or development within their territorial jurisdiction is controlled by the Corporation being the planning authority under the MRTP Act and to that extent the Corporation exercises control over the construction activities and the construction of the buildings, or cabins/rooms/towers on and above the buildings. The Notification under Section 19-B r/w Section 4 of the Telegraph Act dated 24-5-1999 does not permit the licensee to exercise the powers of telegraph authority under the Telegraph Act and on the contrary the licensees require the express permission of the owners of the property in order to construct cabin and to erect tower on the building. The owners of the properties have no power to permit any such construction or installation of any equipment in the building without prior permission of the Corporation. The Notification specifically provides that the licensee is bound to comply with the provisions of the Telegraph Act as well

as "of any other law for the time being in force" and the same would include the provisions of the MRTP Act and the DCRs.

8. It is further case of the respondent No.2 that it has framed the procedure for permitting the cellular towers (equipments) on the roof tops and the construction of semi-permanent structure by the circular dated 7-12-2000. The petitioners had obtained licence on 28-9-2001 and were fully aware of the requirement of the permission to install and construct cabins/rooms/cellular towers on the roof tops. The petitioners had submitted incomplete information while applying for permission and they have carried out the construction of the cabins unauthorisedly and illegally. For the purpose of installation of Cell Sites on the roof top of houses/buildings, the concerned telephone company has to install structures and for that purpose has to carry out construction necessary for the structural safety of the building and only thereafter can construct cabins and/or erect DG Sets and such installations and constructions are not covered under the provisions of the Telegraph Act. The demand of the premium is not illegal. There are many contingencies and construction activities which are allowed free of FSI in terms of the DCRs which are subject to payment of premium. The expression "free of FSI" indicates that

even if the permissible FSI has been consumed by the owner of a building, the permission to construct a cabin can be granted on the roof top of such building, not exceeding 20 sq.metres per building, but it does not mean that such permission has necessarily to be unconditional and/or without any other liability or obligation. On the contrary, the provisions of the MRTP Act and the DCRs framed thereunder specifically empower the Corporation to decide the conditions under which such permission can be granted. The instructions issued by the State Government do not prohibit the levy of premium, development charges, security deposit, etc., nor it even suggests that the provisions of the DCRS would not apply to such constructions.

9. It is further case of the respondents that Writ Petition No.8518 of 2003 was not allowed in entirety by the order dated 13-12-2004 and the question of levy of premium by the Corporation was left open. Further, in terms of the directions issued in the said order, the Cell Site had already been inspected and show cause notices were issued for the violation of the DC Rules by the petitioners. As the petitioners failed to comply with the said notices, further notice under Section 260(2) of the Bombay Provincial Municipal Corporation Act, 1949, hereinafter called as "the BPMC Act", was issued.

10. It is further case of the respondents that the construction of cabin admeasuring 20 sq.metres and the installation of the tower on the roof top of the buildings fall within the purview of the word "development" under the DCRs and, therefore, the respondents are empowered to charge and recover the premium and deposit, as demanded. However, since the construction exceeds the FSI as well as it is beyond the permissible height of the building and there is non-permissible use of terrace and therefore the same could be tolerated in terms of 6.6.2.2. of the DCRs by charging premium to avoid hardship of demolition of such construction/development. Every permission for construction of a building or development is granted by the respondent No.2 under Sections 44 and 45 of the MRTP Act r/w Sections 253 and 254 of the BPMC Act. The cabin and tower fall within the meaning of the explanation "Building" under the MRTP Act and the BPMC Act. Besides, the Notification dated 4-7-2005 issued under Section 154 of the MRTP Act empowers to charge and recover the premium and deposit as stipulated thereunder and such demand cannot be treated as tax or fee, as alleged by the petitioners. The demand is in relation to charges recoverable in terms of the provisions of law stated above.

11. The Cell Sites and towers, the construction and erection of which is the cause for the dispute between the parties, comprise of combination of Microwave Equipment, GSM Base Transmission Equipment and other equipments. A BTS Site/Cell Site consists of a pre-fabricated shelter housing the power system and Radio component together with an antenna tower. This Station receives and transmits signals by means of electromagnetic waves, which are transmitted without any line connection, from and to cellular mobile phones and the Basic Telephone Exchanges, and thus establishes a network for mobile cellular communication. The installation and operation of Cell Sites on the top of the house is said to be essentially for better and proper functioning and operation of cellular mobile telephone system in the concerned area.

12. The first point which arises for consideration is whether the licensees, under Section 4 of the Telegraph Act who have been delegated the powers under the Notification dated 24-5-1999, are empowered to exercise all the powers of the telegraph authority under Section 10 of the Telegraph Act?

13. The Section 10 of the Telegraph Act deals with the **power of the telegraph authority** to place and maintain telegraph lines and posts. It specifically provides

that the telegraph authority may, from time to time, place and maintain a telegraph line under, over, along or across, and posts in or upon, any immovable property. The proviso (a) thereto provides that **the telegraph authority** shall not exercise the powers conferred by the said Section except for the purpose of a telegraph established or maintained by the Central Government or to be so established or maintained. The Clause (b) of the proviso provides that the Central Government shall not acquire any right other than that of user only in the property under, over, along, across, in or upon which **the telegraph authority** places any telegraph line or post. The Clause (c) of the proviso provides that except as provided under the Telegraph Act, **the telegraph authority** shall not exercise those powers in respect of any property vested in or under the control or management of any local authority, without the permission of that authority. The Clause (d) of the proviso provides that in the exercise of the powers conferred by the said Section, **the telegraph authority** shall do as little damage as possible, and, when it has exercised those powers in respect of any property other than that referred to in Clause (c); shall pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers. (Emphasis supplied)

14. The Section 12 deals with the power of the local authority to give permission under Section 10, Clause (c) of the proviso thereto. It provides that any permission given by a local authority under Section 10, Clause (c), may be given subject to such reasonable conditions as that authority thinks fit to impose, as to the payment of any expenses to which the authority will necessarily be put in consequence of the exercise of the powers conferred by that section, or as to the time or mode of execution of any work, or as to any other thing connected with or relative to any work undertaken by **the telegraph authority** under those powers. (Emphasis supplied)

15. As far as Clause (a) of the proviso to Section 10 of the Telegraph Act is concerned, the same relates to the telegraph established and maintained or to be so established or maintained by the Central Government and the powers to be exercised by the telegraph authority in relation to such telegraph. Apparently, it does not relate to the powers to be exercised by the licensee under Section 4 of the Telegraph Act. As far as Clause (b) is concerned, it merely provides for limitation of the rights of the Central Government over the property wherein the telegraph line or post is placed by the telegraph authority in exercise of powers under the said Section. As regards the Clause (c) of the proviso to

Section 10 is concerned, it is nobody's case that the construction of the Cell Site, cabin and erection of tower has been done or is being done in the property vested in or under the control or management of the Corporation or any other local authority. As regards Clause (d) is concerned, it relates to the powers exercisable by the telegraph authority under Clauses (a) to (c) of the said proviso to Section 10 and the obligation to pay compensation to the persons interested on account of damage sustained in exercise of such powers by the telegraph authority. Obviously therefore, all the provisions of law comprised under Section 10 are essentially in relation to the powers of the telegraph authority for placing telegraph line or post in respect of the telegraph established or maintained or to be so established or maintained by the Central Government and the same do not relate to the powers of the licensee under Section 4 of the said Act.

16. The Section 3 of the Telegraph Act deals with the definitions of the expressions used in the Telegraph Act. The Section 3(2) defines the term "telegraph officer" to mean any person employed either permanently or temporarily in connection with a telegraph established, maintained or worked by the Central Government or by a person licensed under the Telegraph Act. The expression "telegraph authority" has been

defined under Section 3(6) to mean the Director General of Posts and Telegraphs, and includes any officer empowered by him to perform all or any of the functions of the telegraph authority under the Telegraph Act. From the definition clauses it is, therefore, abundantly clear that the expression "telegraph authority" specifically refers to the Director General of Posts and Telegraphs or any other officer specifically empowered by such Director General of Posts and Telegraphs to perform all or any of the functions of the telegraph authority under the Telegraph Act. In other words, the officer so empowered can be called as telegraph authority only when such empowerment is related for the purpose of exercise of any of the functions of the telegraph authority under the Telegraph Act and not otherwise. Besides, the delegation in that regard has necessarily to be by the Director General of Posts and Telegraphs and not by any other authority.

17. The Section 19-B of the Telegraph Act provides that the Central Government may, by Notification in the Official Gazette, confer upon any licensee under Section, in respect of the extent of his license and subject to any conditions and restrictions which the Central Government may think fit to impose and to the provisions of Part-III, all or any of the powers which the telegraph authority possesses under Part-III with

regard to a telegraph established or maintained by the Government or to be so established or maintained. The provisions of law comprised under Section 19-B or any other Section of the Telegraph Act nowhere speak of delegation of powers of telegraph authority in relation to the telegraph established or maintained by the Central Government to the licensees. The Section 4 of the Telegraph Act which relates merely to the power of issuance of licences for the establishment and maintenance of telegraph lines by such licensees and not for licensee to be appointed as telegraph authority under the Telegraph Act for or in respect of such establishment in the area in which the licence is granted.

18. If one peruses the Notification dated 24-5-1999, it is apparent that the Notification nowhere delegates the powers of the telegraph authority under the Telegraph Act to the licensees. On the contrary, the delegation is absolutely limited to the extent of "seeking way-leave" from the private owners to place and maintain telephone lines and to enter such properties for that purpose. The Notification clearly states that:

> "S.O. 382(E):- In exercise of the provisions of section 19B, of Part-III of the Indian Telegraph Act, 1885 (13 of

1885) (hereinafter referred to as the said Act), the Central Government, hereby, confers the powers upon duly authorised licensee(s)/private basic telephone service operator(s) under section 4 of the said Act, (hereinafter referred to as the said licensee) to seek way leave from any person including public authority, public corporation, autonomous body, State Government or Central Government (hereinafter referred to as the "owner" of immovable property) in the respective licensed service area for the following in respect of a property vested in or under the control or management of the owner in connection with providing the telephone service by the said licensee(s) to its subscribers in the said licensed service area during the currency of its licence, namely :-

1(a) to place and maintain telephone lines under, over, along or across and posts in or upon property vested in or under the control or management of concerned owner.

(b) to enter on that property under, over, along, across, in or upon which the line or has been placed, in order to examine, repair, alter or remove telephone lines or posts established or being maintained by the said licensee(s)."

The Notification further imposes certain conditions to be followed by the licensee while exercising the delegated power and the same read as under:

"Provided that the said licensee shall:

(i) always comply with the provisions of the said Act or any other law for the time being in force; and

(ii) not exercise the powers conferred under this notification in respect of the said property vested in or under the control or management of the concerned owner, without the express permission of that owner;

(iii) pay full compensation to the aggrieved owners for any damage

> sustained by them by reason of the exercise of the powers conferred on the said licensee under this notification."

The Notification further provides under para 3 thereof that:

> "3. The powers conferred under this notification, shall be governed by the provisions of the said Act, as applicable to that property regarding which the concerned owner, may give permission to the said licensee and subject to such reasonable conditions as such owner thinks fit to impose, as to the payment of any expenses to which such owner will necessarily be put in consequence of the exercise of the powers so conferred, or as to the time or mode of execution of any work, or as to any other thing connected with or relating to any work undertaken by the said licensee under the said powers."

19. The said Notification, therefore, clearly provides that the delegation of powers under the Telegraph Act is restricted to seek way-leave from the private owners of

the property in order to enable the licensee to place and maintain telephone lines and to enter the property for that purpose. However, in the course of entering and placing and maintaining the telephone lines in or over any property, the licensee has to comply with the provisions not only of the Telegraph Act but also of "any other law for the time being in force". The Notification, therefore, clearly discloses limited powers under the Telegraph Act being delegated to the licensees. The licensee has nowhere been given the powers which are granted to the telegraph authority under the Telegraph Act. On the contrary, the powers which have been delegated under Section 19-B are of such nature that it nowhere discloses or indicates any power under Section 10 of the Telegraph Act having been delegated to the licensees. Besides, the delegation of power has been made subject to "any other law for the time being in force". The said expression clearly discloses that the construction of the Cell Sites cabins and the erection of towers is not only subject to the provisions of the Telegraph Act but is also subject to the other relevant Acts and Rules in force in the concerned area. It further specifies that the entry and the installation has necessarily to be with the express permission of the owner of the private property. It is, therefore, clear that the licensees under Section 4 of the Telegraph Act are not empowered to exercise the

powers of the telegraph authority in terms of Section 10 of the Telegraph Act but their powers are restricted to the extent the same are delegated under the said Notification issued under Section 19-B of the Telegraph Act.

20. Undisputedly, the infrastructure for providing cellular mobile telephones in the locality, has to be installed on the roof tops of the buildings. Being so, while dealing with the issue relating to the scope of the powers of the licensee under Section 4 in terms of Section 19-B r/w the Notification dated 24-5-1999, it would be necessary to ascertain whether the construction of cell cabin and the erection of tower would be a "building" and/or "development" within the meaning of the MRTP Act and/or other Corporation Acts.

21. The Section 2(7) of the MRTP Act defines the term "development" to mean the carrying out of buildings, engineering, mining or other operations in or over or under, land or the making of any material change, in any building or land or in the use of any building or land or any material or structural change in any heritage building or its precinct and includes demolition of any existing building, structure or erection or part of such building, structure or erection and reclamation, redevelopment and lay-out and sub-division of any land;

and to develop shall be construed accordingly. The term "Building operations" has been defined in Section 2(5) of the MRTP Act to include erection or re-erection of a building or any part thereof, roofing or re-roofing of any part of a building or of any open space, any material alteration or enlargement of a building, any such alteration of a building as is likely to affect an alteration of its drainage or sanitary arrangement or materially affect its security or the construction of a door opening on any streets or land not belonging to the owner.

22. The term "building" has not been defined under the MRTP Act but the definition of the said term under the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, hereinafter called as "the MMCNPIT Act" provides that the same includes a house, out-house, stable, shed, hut and other enclosure or structure whether of masonry, bricks, wood, mud, metal or any other material whatever, whether used as a human dwelling or otherwise, and also includes varandahs, fixed platforms, plinths, door steps, walls, including compound wall and fencing and the like. At the same time, Section 2(5) of the MRTP Act defines "building operations" to include the erection or re-erection of a building or any part thereof, roofing or re-roofing of any part of a building or of any open

space, any material alteration or enlargement of a building, any such alteration of a building as is likely to affect an alteration of its drainage or sanitary arrangement or materially affect its security or the construction of a door opening on any streets or land not belonging to the owner.

23. In terms of Section 2(19) of the MRTP Act, a planning authority thereunder means a local authority and the term "local authority" is defined under Section 2(15) to mean (a) the Bombay Municipal Corporation constituted under the Bombay Municipal Corporation Act, or the Nagpur Municipal Corporation constituted under the City of Nagpur Municipal Corporation Act, 1948, or any Municipal Corporation constituted under the Bombay Provincial Municipal Corporations Act, 1949, (b) a Council and a Nagar Panchayat constituted under the Maharashtra Municipal Councils Nagar Panchayats and Industrial Townships Act, 1965, (c)(i) a Zilla Parishad constituted under the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, (ii) the Authority constituted under the Maharashtra Housing and Area Development Act, 1976, (iii) the Nagpur Improvement Trust constituted under the Nagpur Improvement Trust Act, 1936, which is permitted by the State Government for any area under its jurisdiction to exercise the powers of a Planning Authority under the MRTP Act.

24. The term "building" has been defined under Section 2(5) of the BPMC Act and under Section 5(7) of the City of Nagpur Corporation Act, 1948, hereinafter called as "the CNC Act" to mean to include a house, out-house, stable, shed, hut and other enclosure or structure whether of masonry, bricks, wood, mud, metal or any other material whatever whether used as a human dwelling or otherwise, and also includes verandahs, fixed platforms, plinths, doorsteps, walls including compound walls and fencing and the like. The term "land" has been defined under Section 2(30) to include the land which is being built upon or is built upon or covered with water, benefits to arise out of land, things attached to the earth or permanently fastened to anything attached to the earth and rights created by legislative enactment over any street.

25. It is true that Section 3(1) of the Telegraph Act defines the term "telegraph" to mean any appliance, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence or any nature by wire, visual or other electro-magnetic omissions, Radio waves or Hertzian waves, galranic, electric or magnetic means. The explanation thereto clarifies that "Radio waves" or "Hertzian waves" means electromagnetic waves

of frequencies lower than 3,000 giga-cycles per second propagated in space without artificial guide. The expression "telegraph line" has been defined under Section 3(4) to mean a wire or wires used for the purpose of a telegraph, with any casing, coating, tube or pipe enclosing the same and any appliances and apparatus connected therewith for the purpose of fixing or insulating the same. The term "post" is defined under Section 3(5) to mean a post, pole, standard, stay, strut or other above-ground contrivance for carrying, suspending or supporting a telegraph line.

26. Taking into consideration the various definitions of the expressions referred to above from the Telegraph Act, MRTP Act, the BPMC Act, the MMCNPIT Act and the CNC Act, it cannot be disputed that the tower sought to be erected would be the "posts" within the meaning of the said expression under the Telegraph Act. The apparatus sought to be installed in the cabin as well as on the tower would be "telegraph lines" within the meaning of the said expression under the Telegraph Act. Though the tower and cabin erected by a licensee on the roof top of a building would be ‘post’ and ‘telegraph line’ within the meaning of the said expression under the Telegraph Act, that by itself will, however, not authorise the licensee to exercise the powers of the telegraph authority under Section 10, in the absence of specific

delegation of such powers under Section 19-B of the Telegraph Act. At the same time, the tower and the cabin would be within the meaning of the "building" as well as the "development" under the BPMC Act (including other Corporation Act) and the MRTP Act respectively. The expression "development" under the MRTP Act clearly includes erection of any structure as well as any material or structural change in the building or its precinct. The term "precinct" would refer to the area adjacent as well as adjoining the building. The word "precinct" denote the area "around every side" of the building. Being so, any addition made or projection carried out beyond the approved construction limits of the building would be "development" and/or "building" within the meaning of the said expression under the MRTP Act and the BPMC Act or the MMCNPIT Act or the NMC Act. The definition of the said terms being very wide, it cannot exclude the erection of tower or construction of a cabin on the roof top of a building.

27. Considering the fact that the delegation of power to enter and install telegraph lines including erection of tower and the construction of cabin being made subject to certain conditions specified under the Notification dated 24-5-1999 and the said conditions include due compliance of the provisions of any law for the time being in force, obviously, it would include

requirement of compliance of the provisions of the MRTP Act and other Corporation Acts by the petitioners when such installation or erection or construction is being carried out within the area of the jurisdiction of the concerned Corporation. It cannot be ignored that erection of poles by the side of the road or in the land of the private property is different from carrying out some construction activity on the roof top of a building. Two things cannot be equated with each other. Being so, the contention on behalf of the petitioners about the non-applicability of the provisions of the MRTP Act or other Corporation Acts on the strength of delegation of power under Section 19-B in terms of the Notification dated 24-5-1999 cannot be accepted.

28. Considering the said definitions, the contention of the petitioners that the tower and/or the cabin would not fall within the definition of "building" or "development" cannot be accepted. Reliance in that regard in the decision in the matter of **State of Bombay v. Sardar Venkat Rao Krishna Rao Gujar,** reported in (1963) 1 SCR 428 (AIR 1966 SC 991) is of no help to the petitioners. That was totally on a different point and in a different set of facts where the question was whether uncovered "ottas" and "chabutras" would fall within the term "the building" under Section 5(a) of the Madhya Pradesh Abolition of Proprietary Rights (Estates,

Mahals, Alienated Lands) Act, 1950 and that therefore, along with the land appurtenant to them they must be settled with the ex-proprietors whose property interest was sought to be abolished under the said Proprietary Rights Act.

29. Reliance was sought to be placed in the decision in the matter of **Senior Electric Inspector and Ors. v. Laxminarayan Chopra and Anr.,** reported in AIR 1962 SC 159 on behalf of the respondents and certainly not without justification. In fact, the said decision clearly lays down that merely because some of the powers of the telegraph authority under the Telegraph Act can be conferred on the licensee under the Electricity Act, it does not follow that all the rights and liabilities of the licensee under the Electricity Act are governed by the provisions of the Telegraph Act. Taking into consideration the scheme of the Telegraph Act and the provisions comprised under Section 10 r/w the definitions referred to above, merely because some of the powers under the Telegraph Act are delegated or conferred upon the licensee under Section 4 of the Telegraph Act, that would not ipso facto lead to a conclusion that all the rights and liabilities of such licensees are governed by the provisions of the Telegraph Act. The licensee under Section 4 cannot be considered as a "telegraph authority" within the meaning

of the said expression under the Telegraph Act. The para 51 of the decision in **Laxminarayan Bhattad v. State of Maharashtra**, reported in (2003) 5 SCC 413 to which attention was drawn is on the point that the direction to be issued by the State Government in terms of Section 154 of the MRTP Act cannot be in supersession of the statutory provisions. It was held so in view of the fact that the State Government had tried to issue directions contrary to the statutory provisions and regulations.

30. The next contention that the Telegraph Act being an exhaustive and complete Code regarding the installation and operation of the telegraph and telecom system and the rights and obligations of the telegraph authorities and that therefore the provisions of the MRTP Act or the Corporations Act cannot be made applicable to the towers or cabins erected or constructed on the top of the roof of the building, cannot be accepted. For the reasons stated above, the licensee is not empowered to exercise all the powers of the telegraph authorities. Merely because the petitioners are granted licence under Section 4, they do not step in the shoes of the telegraph authority under the Telegraph Act. The powers which they can exercise under the Telegraph Act are limited to the extent delegated to them in terms of the Notification issued under Section 19-B of the Telegraph

Act r/w the provisions of the other laws in force in the area where the licensees are permitted to install such system.

31. Being so, the action which is proposed to be taken by the respondents in relation to the erection of tower or construction of cabin on the roof of the building in terms of the provisions of the MRTP Act or the Corporation Acts cannot be found fault with nor the same can be held to be without jurisdiction or authority. The point, however, now needs to be considered is whether in exercise of such powers, can the concerned authorities recover any premium or demand deposit and levy the charges on the basis of height of the tower and in relation to construction of a cabin on the roof top of a building on the strength of the said directions under the said Notification dated 4-7-2005?

32. The provisions of law comprised under the MRTP Act apparently disclose that any development to be carried out within the planning area needs prior sanction for such development by the planning authority. It further discloses that the planning authority can grant such permission provided the proposed development is in accordance with the provisions of the DCRs. It can also levy development charges in terms of the schedule to the said Act; it can take action either for regularisation

or for demolition of the development carried out without prior sanction of the planning authority and even recover the expenses incurred towards or in relation to such proceedings against the development carried out without prior sanction.

33. However, Section 124A of the MRTP Act imposes restrictions over the exercise of powers of the planning authority in relation to levy of development charges and provides that the same shall be in accordance with the schedule annexed to the MRTP Act. The schedule nowhere provides for payment of premium or an amount of Rs.50,000/- or the amount to be calculated, depending upon the height of the structure to be erected. All the charges, which are spoken of under Section 124A r/w the schedule appended to the MRTP Act, are essentially and relate only for the development or use of land as permissible under the MRTP Act. The terms "development charges" has not been defined under the MRTP Act or under the Corporations Act. The schedule annexed to the MRTP Act does not refer to the development which is carried out beyond or without the sanction granted by the planning authority. In other words, the charges spoken of in the schedule under Section 124A relate to those which can be charged for development or use of land in accordance with the development plan and not beyond the permissible limits under the development

plan.

34. The point, therefore, which is sought to be raised is that the MRTP Act which empowers the authorities to frame the DCRs, nowhere permits the planning authority to charge premium or to demand deposit or to levy the charges based on height of the tower. It is their contention that as far as the permission is concerned, the charges are to be restricted in terms of the schedule under Section 124A which they have already paid. Therefore, the relevant point which is sought to be raised is whether imposition of such charges under the DCRs would be permissible in the absence of specific provision in that regard in the MRTP Act.

35. The law on the point that exaction of money in the form of either tax or fee or charges by the Government or the local authority is not permissible unless it is statutorily authorised is well-settled. The decision of the Apex Court in **Ahmedabad Urban Development Authority v. Sharadkumar Pasawalla & Ors.,** reported in (1992) 3 SCC 285, and further by the **Calcutta Municipal Corporation v. Shrey Mercantile,** reported in (2005) 4 SCC 245 are very clear in that regard.

36. The Section 154(1) of the MRTP Act provides that every Regional Board, planning authority and development

authority shall carry out such directions or instructions as may be issued from time to time by the State Government for the efficient administration of the MRTP Act. Can the direction to charge premium of Rs.50,000/- for allowing erection of the tower on the roof top of buildings even if it amounts to consuming an area in excess of permissible FSI be said to be one being for efficient administration of the MRTP Act? Plain reading of the concerned circular stated to have been issued under Section 154(1) nowhere reveals imposition of such premium to be for efficient administration of the MRTP Act. The basis for such direction in the circular itself reveals that the same is to have uniform policy in the State in relation to the charges to be recovered from the licensees erecting such towers. Even otherwise, question of levy of charges in whatever form, either in taxes or fees, in relation to the development or the construction in excess of development cannot be said to be within the domain of the executive power of the State Government so that the same can be regulated by issuing instructions under Section 154 of the MRTP Act. Indeed, the Apex Court in **Laxminarayan Bhattad's** case (supra) had held thus:

> "A direction of the State Government in terms of Section 154 of the Act cannot

> supersede the statutory provisions contained either in the main enactment or the statutory regulations. The State of Maharashtra has absolutely no jurisdiction to issue any directive contrary to the statute or the statutory regulations."

In other words, the Government is empowered to issue such directions which are necessary for effective and purposeful enforcement of the provisions of the MRTP Act, but in exercise of such powers, it cannot over-ride or contravene the statutory provisions. Needless to say that the contravention or over-riding of constitutional mandate is totally out of reach of such power.

37. Being so, the demand for deposit or premium made under Exhibits-E to E-10 having been made pursuant to the directions under Clauses 2 and 3 of the Notification dated 4-7-2005, cannot be sustained. The demand notices under Exhibits-E to E-10 clearly refer to the demand having been made in terms of the Notification dated 4-7-2005. The said demand notices do not refer to any other provision of law, either under the MRTP Act or under the BPMC Act or any other Corporation Act to justify the demand thereunder. The said directions issued under Clauses 2 and 3 of the Notification dated

4-7-2005, therefore, are liable to be held to be beyond the exercise of powers of the Government under Section 154 of the MRTP Act and for the same reason, the demand for deposit and premium based on such directions is also to be held in contravention of Article 265 of the Constitution of India r/w Sections 124A, 124B, 124C and 124E of the MRTP Act.

38. The respondents, however, sought to justify the claim of deposit and premium on the basis of the provisions of law comprised under Clause 6.6.2.2. of the DCRS, while contending that construction of cabin and erection of tower on the roof top of buildings amount to construction/development beyond the permissible limits and having been carried out without prior permission of the respondents. It is also sought to be contended that the owners of the buildings are not the owners or occupiers of such buildings and are not entitled to permit to carry out such construction or development without the prior permission of the respondents and contrary to the rules and regulations under the DCRs.

39. As regards the contention of the respondents that the demand for deposit and premium is justifiable in terms of Clause 6.6.2.2. of the DCRs is concerned, that is not the subject matter of challenge in the petition.

The challenge in the petition is confined to the Notification dated 4-7-2005. Ex facie the demand notices Exhibits-E to E-10 have been issued on the basis of the directions issued in the said Notification dated 4-7-2005. In the circumstances, we are not required to deal with the contention which is sought to be raised on behalf of the respondents on the basis of Clause 6.6.2.2., suffice to observe that the demand solely on the basis of the directions issued in the Notification dated 4-7-2005, as comprised under Exhibits-E to E-10 annexed to the petition, cannot be sustained. At the same time, it is also to be noted that no development or construction is permissible beyond the prescribed limits and beyond what is sanctioned. It is undisputed fact that at the time of drafting and bringing into force the MRTP Act, innovative method of establishing telephone system was not in contemplation nor perhaps it was visualised. The Cell system of telephone is a new development of the last decade of the last century. Undisputedly, there are no specific provisions either in the Telegraph Act or the MRTP Act dealing specifically with such new system. However, Section 124L of the MRTP Act provides that:

> "(1) The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith

> contained in this Act or any other law for the time being in force.
>
> (2) Subject to the provisions of sub-section (1), the provisions of this Chapter shall be in addition to, and not in derogation of, any other provisions of this Act or any law relating to municipal corporation, municipal council or other local authority of any urban area."

Obviously therefore, any development carried out will have to be in accordance with the provisions of the BPMC Act also, and the provisions of law comprised under Section 253 onwards in Chapter XV of the BPMC Act clearly empowers the respondents to take appropriate action in relation to the development or construction carried out within its jurisdiction. The authorities are empowered to take action for demolition or removal of the construction or development carried out beyond the permissible limit. Further, the said provisions of law also empower recovery of expenses incurred for enforcement of such actions. Similar are the provisions of law under Section 124K of the MRTP Act. To what extent such action would be within the parameters of law and to what extent it is illegal or in excess of the

powers under the statutory provisions, cannot be a subject-matter of this petition wherein there is no challenge to such powers of the respondents.

40. The licensee does not step in the shoes of the telegraph authority under the said Act. Being so, even though the tower and/or cabin can be called as a "post" as defined under Section 3(5) of the Telegraph Act, that by itself will not absolve the licensee from complying with the requirements of the provisions of law under the MRTP Act and the BPMC Act. The delegation of power under Section 19-B of the Telegraph Act to the licensees is not to the extent of extending the powers of the telegraph authority under the Telegraph Act to the licensees.

41. As regards Section 7(2) of the Telegraph Act is concerned, undoubtedly, it empowers the Central Government to frame rules under the Telegraph Act for the conduct of telegraphs. It also empowers the Central Government to frame rules regarding the conditions and restrictions subject to which any telegraph line, appliance or apparatus for telegraphic communication shall be established, maintained, worked, repaired, transferred, shifted, withdrawn or disconnected. However, power to frame rules by itself does not result in taking away all the powers of the local authorities

like the respondents from exercising their power under the statutory provisions comprised under the MRTP Act and the BPMC Act. Besides, there is no conflict between those provisions of the said statutes and the rules so far framed under the Telegraph Act.

42. In **Surinder Singh v. Central Government and others,** reported in AIR 1986 SC 2166, the Apex Court had held that where a statute confers powers on an authority to do certain acts, or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of rules unless the statute expressly provides for the same. In other words, framing of rules is not condition precedent to exercise the power expressly and unconditionally conferred by the statute. That does not mean that the authority cannot act in exercise of power under the Act.

43. In the result, the petition succeeds; the directions issued under Clauses 2 and 3 of the Notification dated 4-7-2005 are hereby quashed and set aside and for the same reason, the demand notices Exhibits-E to E-10, annexed to the petition and issued by the respondents to the petitioners, are also quashed and set aside and it is further directed that the respondents shall not be entitled to take any action

based on the quashed notices. It is, however, made clear that this shall not preclude the respondents from proceeding to take appropriate action in accordance with the provisions of law in force in relation to constructions and developments under the MRTP Act and the rules and regulations made thereunder as well as under the various Corporation Acts applicable to the respondents. The rule is made absolute in above terms with no order as to costs.

(V.M. Kanade, J.) (R.M.S. Khandeparkar, J.)

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